BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID FLOYD THOMAS Claimant	)	
VS.	)	
FLOYD L. THOMAS Respondent	)	Docket No. **1,035,865**
AND	)	
TRAVELERS INDEMNITY COMPANY Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 29, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant alleged injury to his low back, left hip and right groin as a result of lifting air conditioners out of windows in the course of his employment on or about February 14, 2007. In April of 2008 the parties entered an Agreed Order which provided claimant treatment for his right hip. The Agreed Order further specifically provided:

> At this time, based on the medical evidence available, the claimant's low back injury or complaints are not compensable as a result of any alleged accident occurring in February 2007. However, the claimant is not prohibited from arguing at a later date that the low back is related to his alleged date of accident with respondent.

Surgery was performed on claimant's right hip. After the surgery claimant complained of continued low back pain. Further testing was recommended but respondent did not authorize the recommended testing based upon its original position that claimant did not injure his low back in February 2007.

A preliminary hearing was held on May 21, 2009, on claimant's request for treatment for his low back. The Administrative Law Judge (ALJ) designated an authorized treating

physician for claimant's low back, hip and groin. Implicit in that decision is a finding that claimant suffered accidental injury to his low back arising out of and in the course of his employment with respondent.

Respondent requests review and argues the claimant failed to meet his burden of proof to establish that he suffered accidental injury to his back on February 14, 2007. Conversely, claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant alleged injury to his low back, right hip and groin as a result of lifting an air conditioner out of a window on approximately February 14, 2007. His personal physician, Dr. Alan J. Fearey, in a letter dated December 3, 2007, opined that claimant's low back and leg pain was "almost certainly related" to the injury he suffered lifting the air conditioner. Conversely, Dr. Paul S. Stein examined claimant on December 14, 2007, at the request of respondent's counsel, and concluded that within a reasonable degree of medical probability he could not state claimant suffered a permanent injury to his lower back on February 14, 2007. Dr. Stein did recommend further orthopedic consultation with regard to claimant's right hip.

As previously noted, the parties then entered the Agreed Order which designated that Dr. Paul Pappademos was authorized to provide medical treatment for claimant's right hip. Dr. Pappademos provided right hip surgery. After the surgery the claimant continued to complain of back and groin pain. Dr. Pappademos recommended an MRI of claimant's lumbar spine and if that was negative he stated he would then recommend a CT of claimant's abdomen and pelvis to rule out hernia or other abdominal or pelvic cause for claimant's continued pain complaints.

Dr. Matthew Henry then examined claimant on February 12, 2009. Dr. Henry recommended a neural foraminal injection to determine whether it would relieve the radiating pain into claimant's groin and help with his back pain. If not, Dr. Henry recommended a discogram at several levels in claimant's lumbar spine. After the injection was performed Dr. Henry then sent a letter dated March 30, 2009, which provided in pertinent part:

> At this point in time, the pain in the right groin does not pertain to any one dermatome and the diagnostic/therapeutic neural foraminal injection did not provide relief of his pain. I do not think that the right anterior groin pain is coming from the back based on the anatomy involved, and your accurate injection. He is not particularly interested in any type of back surgery. At this point in time, I obviously

> do not recommend it as his main symptom is the right anterior groin and what he describes as limitation of range of motion of the right hip.[1]

But Dr. Henry did note that with regard to causation claimant informed the doctor that his back pain started after the initial injury and has continued since that point in time.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[4] Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.[5]

The claimant consistently complained of lower back pain but his initial complaints were focused upon his hip and groin. Consequently, he agreed to proceed with treatment for his hip with the hope that such treatment would alleviate his complaints. When surgery failed to provide relief he then requested additional medical treatment.

Respondent argues that there is no medical evidence that relates claimant's back complaints to the injury in February 2007. Respondent further argues that Drs. Pappademos and Henry recommended additional diagnostic testing but did not address the issue of causation.

Although Drs. Pappademos and Henry did not directly address the issue of causation for claimant's low back pain, the medical evidence introduced at the May 21, 2009 preliminary hearing does contain the opinions of Drs. Fearey and Stein on that issue. Dr. Fearey attributes claimant's low back pain to the work-related February 14, 2007 incident. Dr. Stein parsed his opinion by concluding that the accidental injury may have

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[1] P.H. Trans., Cl. Ex. 3.

[2] K.S.A. 2007 Supp. 44-501(a).

[3] K.S.A. 2007 Supp. 44-508(g).

[4] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[5] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

increased claimant's symptomatology but he could not state that the incident caused permanent injury. Finally, claimant has consistently complained of persistent low back pain since the February 2007 incident. The claimant's testimony alone is sufficient evidence of his physical condition.[6] Consequently, this Board Member finds claimant has met his burden of proof to establish that the work-related incident lifting the air conditioner, at a minimum, aggravated his pre-existing low back condition.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 29, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2009.

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DAVID A. SHUFELT
BOARD MEMBER

c: Kelly Johnston, Attorney for Claimant
Matthew Schaefer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[7] K.S.A. 44-534a.

[8] K.S.A. 2008 Supp. 44-555c(k).